STATE OF MICHIGAN
IN THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL FROM THE
MICHIGAN COURT OF APPEALS

(Before: Swartzle, P.J., and Sawyer and Ronayne Krause, JJ)

ESTATE OF DIANA LYKOS VOUTSARAS, by KATHLEEN M. GAYDOS, Personal Representative,

Plaintiff-Appellee,

and

SPIRO VOUTSARAS,

Plaintiff,

v

GARY L. BENDER, RICHARD A. CASCARILLA, LINDSAY N. DANGL, VINCENT P. SPAGNUOLO, and MURPHY & SPAGNUOLO P.C.,

Defendants,

and

KENNETH M. MOGILL, MOGILL POSNER & COHEN, KERN G. SLUCTER and GANNON GROUP, P.C.,

Defendants-Appellants.

Supreme Court No. 159124

Court of Appeals No. 340714

Ingham County Circuit Court
Case No. 16-263-NM

APPELLANTS SLUCTER AND GANNON GROUP'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The Court of Appeals issued a published and binding opinion (MCR 7.215(C)(2) and (J)(1)) that alters Michigan law regarding expert witness immunity. *Estate of Voutsaras v Bender*, 326 Mich App 667; 929 NW2d 809 (2019). The Court of Appeals reversed the Circuit Court's orders granting summary disposition on immunity grounds in favor of Defendants-Appellants Kenneth M. Mogill and Mogill, Posner & Cohen ("Mogill") and Kern G. Slucter and Gannon Group P.C. ("Slucter") (Circuit Court orders attached in Joint App, pp. 55a, 58a).

Mogill filed an application for leave to appeal to this Court. Slucter also filed an application for leave to appeal, concurring with Mogill's application. On December 13, 2019, this Court directed the Clerk to schedule oral arguments on the applications and directed the parties to file supplemental briefs "addressing whether the privilege of witness immunity extends to retained experts sued for professional malpractice. See *Maiden v Rozwood*, 461 Mich 109 (1999)." Slucter files this supplemental brief to address the supplemental question presented by the Court.

SUPPLEMENTAL QUESTION PRESENTED BY THE COURT

I. Does the privilege of witness immunity extend to retained expert witnesses sued for professional malpractice?

Mogill answers:	Yes
Slucter answers:	Yes
Plaintiff-Appellee Estate answers:	No
The Court of Appeals answered:	No

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY CREATED A NEW CAUSE OF ACTION FOR WITNESS LIABILITY.

This issue is implicit in this Court's question presented, as well as the Court of Appeals' underlying opinion. This Court asks "whether the privilege of witness immunity extends to

retained experts sued for professional malpractice." But Slucter, a real estate broker[1], was not sued for *professional malpractice* in the first place – he was sued for *negligence* as an expert witness. Clarifying this point assists reasoned analysis of the witness immunity issue and demonstrates why the Court of Appeals' decision is contrary to established law.

The Court of Appeals simply grouped all the defendants together, ignored the complaint, and "presumed for the sake of argument that defendants are subject to claims for professional malpractice by the Estate and breached their professional duties to Diana Voutsaras." 326 Mich App at 673. The Court of Appeals then conducted its analysis based on this amorphous and inaccurate assumption, concluding that:

> When a duty of professional care exists such that a malpractice action may be maintained, witness immunity is not a defense to a malpractice action except, as noted, insofar as the action is premised on the substance of the professional's evidence or testimony intended to be provided to the court. [326 Mich App at 667.]

The Court of Appeals' conclusion is self-contradictory, and creates uncertainty in analyzing the underlying legal issue, because this legal action against Slucter ***was*** "premised on the substance of [Slucter]'s evidence or testimony intended to be provided to the court." Slucter was not sued for doing anything in his professional capacity as a broker (such as negotiating or closing a real estate transaction). Instead, he was hired to be an expert witness, and he was sued solely for his work as an expert witness. Slucter should not be liable for any cause of action in this case. Although this Court could (and should) rule for Slucter based on a witness immunity analysis (discussed in Argument II below), that whole exercise should not be necessary, since there is no valid cause of action against Slucter in the first place.

[1] "Slucter" is used for convenience and also refers to Gannon, as indicated in the Introduction, since the claims are essentially against Mr. Slucter.

The Court of Appeals should have considered the Estate's Complaint in reviewing the Circuit Court's summary disposition decision.[2] The Estate is bound by its Complaint,[3] and Slucter accepts it for argument's sake here.[4] The Estate's Complaint relevantly states that Slucter was hired by attorneys solely to work as an expert witness regarding claims that were the subject of ongoing litigation, which is all that Slucter did:

> 23. ***In May 2014***, the Attorneys advised Voutsaras, as part of their litigation strategy, to ***file*** . . . ***Third Party Complaints*** against Byron P. Gallagher, Jr., and Gallagher Law Firm, PLC and Accord Management, LLC . . .
>
> 25. ***The Third Party Complaint*** against Byron P. Gallagher, Jr. and Accord Management, LLC ***was based on various claims associated with real estate broker licenses*** held by Byron P. Gallagher, Jr. and Accord Management, LLC . . .
>
> 28. ***In October 2014, Voutsaras***, on the advice of the Attorneys, ***retained Slucter and Gannon to provide expert opinions on real estate broker standards*** relating to Byron P. Gallagher, Jr. and Accord Management, LLC . . .
>
> 30. ***Slucter and Gannon provided expert opinions to the Attorneys*** for the benefit of Voutsaras and Voutsaras relied on the expert opinions in the Litigation (Slucter Opinions). [Joint App, pp. 7a – 8a; emphasis added.]

The Court of Appeals recognized that a claim for professional malpractice is "'predicated on the failure of the defendant to exercise the requisite professional skill'" 326 Mich App at 672,

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[2] This Court reviews a trial court's decision on summary disposition *de novo*. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). On motions for summary disposition under MCR 2.116(C)(7), the Court must consider the allegations of the complaint and the documentary evidence submitted by the parties. *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008). Where a motion for summary disposition is supported with documentary evidence, the burden shifts to the opposing party, which cannot rely on mere allegations or denials in the pleadings. MCR 2.116(G)(4); see also, *Maiden v Rozwood*, 461 Mich 109, 120-21; 597 NW2d 817 (1999).

[3] *Lenawee County v Wagley*, 301 Mich App 134, 160; 836 NW2d 193 (2013) ("A party is 'bound by [its] pleadings,' *Joy Oil Co v Fruehauf Trailer Co*, 319 Mich 277, 280; 29 NW2d 691 (1947), and it is not permissible to litigate issues or claims that were not raised in the complaint").

[4] Slucter was dismissed before answering the Complaint and reserves all rights to answer the Complaint to the extent this litigation continues.

quoting *Broz v Plante & Moran, PLLC*, 326 Mich App 528, 535-37; 928 NW2d 292 (2018). But the Court neglected to consider the obvious question: Professional skill at doing what? Slucter was not sued for doing anything in his professional capacity as a real estate broker. Instead, Count III of the Complaint (entitled "Negligence of Slucter and Gannon") is based entirely on Slucter's work as an expert witness in preparing opinion testimony on broker duties in the ongoing litigation:

> 65. ***In October 2014, Slucter and Gannon were retained by the Attorneys*** on behalf of Voutsaras, ***to provide opinions on the issue of*** whether Byron P. Gallagher, Jr. and Accord Management, LLC ***owed any duties*** to Spiro Voutsaras, and ***if so, whether those duties were breached to (a) the Attorneys to support their litigation strategy and (b) the Court in the form of expert witness testimony***. [Joint App, p. 12a; emphasis added.][5]

The Court of Appeals' inaccurate and incomplete analysis essentially created a new cause of action for an alleged "failure … to exercise the requisite professional skill" ***solely as a witness***. This would be a terrible result for the judicial system, because it would have a chilling effect on practicing professionals being willing to work as expert witnesses, thereby hampering courts in their fact-finding and decision-making.

The Court of Appeals' analysis also improperly puts expert witnesses in the untenable position of guaranteeing the results of litigation. Consider how this plays out: If a person agrees to be an expert witness, then they are required to be a zealous advocate for the client that calls them as a witness. If not, the client can sue the witness. Courts can also expect to be presented–perhaps

[5] The quoted paragraphs of the Complaint lack precision and consistency regarding who retained Slucter. Paragraph 28 alleges that Voutsaras did so on the advice of counsel; Paragraph 30 alleges that Slucter provided opinions to Voutsaras' counsel for Voutsaras' benefit; and Paragraph 65 alleges that Slucter was retained by Voutsaras' counsel. In any event, the Complaint is clear in alleging that Slucter was retained to provide expert witness opinions in ongoing litigation.

even inundated–with lawsuits, because now losers in litigation can get a "second bite at the apple" by suing their own expert witnesses.

Slucter could not be sued for his work as an expert witness in the first place, and it should be unnecessary to even reach the issue of Slucter's immunity from this non-viable cause of action against him. The Court of Appeals' decision is unworkably confused by and unfounded in its assumption that there was any underlying cause of action asserted against Slucter. Therefore, Slucter urges this Court to clarify the lack of an underlying cause of action, as well as reaffirm the law with respect to witness immunity.

II. THE COURT SHOULD REAFFIRM *MAIDEN v ROZWOOD*.

Maiden v Rozwood's legal principles are as valid today as they were twenty years ago. The Court of Appeals erred in departing from those controlling principles, especially as discussed below.

A. "Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried." [6]

The above-quoted holding was well-supported when this Court made it, and it is still correct. See, for example, *Couch v Schultz*, 193 Mich App 292, 295; 483 NW2d 684 (1992) (recounting the standard and that: "The immunity extends to every step in the proceedings and covers anything that may be said in relation to the matter at issue, including pleadings and affidavits"); *Oesterle v Wallace*, 272 Mich App 260, 268; 725 NW2d 470 (2006) (absolute immunity applied to an allegedly defamatory statement in a settlement letter that was made after the commencement of litigation).

[6] *Maiden, supra*, 461 Mich at 134, citing *Martin v Children's Aid Society*, 215 Mich App 88; 544 NW2d 651 (1996); *Rouch v Enquirer & News*, 427 Mich 157, 164; 398 NW2d 245 (1986); *Meyer v Hubbell*, 117 Mich App 699, 709; 324 NW2d 139 (1982); *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695; 108 NW2d 761 (1961).

The Court of Appeals here carved out an exception by reasoning that "the policy considerations in *Maiden* were clearly focused on the freedom witnesses must have to give *damaging* testimony without fear of possible reprisal. . . However, whether witness immunity protects the Mogill defendants from giving *professionally incompetent* testimony, which might or might not be favorable, was clearly not a matter considered by the *Maiden* Court." 326 Mich App at 674-75 (emphasis in original).

The Court of Appeals' "damaging testimony" distinction neglects the fundamental point that witnesses owe their duty to the court. The *Maiden* Court explained, for example, that "the duty imposed on a witness is generally owed to the court, not the adverse party. Accordingly, a breach of the duty owed to the court does not give rise to a cause of action in tort by the adverse party." 461 Mich at 133 (footnote omitted).

The Court of Appeals also neglected that the judicial system could not function without witnesses. The *Maiden* Court continued:

> [W]itnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial administrative capacity as well as 'those persons other than judges without whom the judicial process could not function.' Witnesses who are an integral part of the judicial process 'are wholly immune from liability for the consequences of their testimony or related evaluations.' [461 Mich at 134 (citations omitted).]

The *Maiden* Court then set forth the holding quoted in the topic heading above. That holding applies here because everything Slucter did was "during the course of judicial proceedings," since he was hired to work on the litigation after it was commenced (Complaint, Paragraphs 23, 25 and 28, quoted above). Similarly, everything Slucter did was "relevant, material and pertinent to the issue being tried," since the whole point of him being retained was to provide expert opinions for the litigation. *Id.*

This Court should apply the same holding in this case, so that witnesses who participate in the judicial process can do so without the specter of civil liability hanging over their heads, as indicated in Argument I and further discussed below.

B. "Falsity or malice on the part of the witness does not abrogate the privilege." [7]

Slucter is accused in the Complaint of negligence in forming expert opinions on the scope of real estate brokerage duties and whether those duties were breached (Complaint, Count III, quoted in part above). Although any court should want expert witnesses to give the court their expert opinions in good faith, regardless of the effects of those opinions on any party, the Court of Appeals decision in this case would effectively require expert witnesses to zealously advocate on behalf of the party that sponsors them or face potential negligence liability to that party.

The Court of Appeals' proposition that a witness can be sued for "giving *professionally incompetent* testimony" (326 Mich App at 675; emphasis in original) also neglects that the judicial process already provides safeguards against incompetent testimony, including the court's gatekeeper role to preclude such testimony from being even admitted, and testing through cross-examination if it is admitted. See generally, MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 783-91; 685 NW2d 391 (2004); *Daubert v Merrell Dow Pharmaceuticals, Inc*, 43 F3d 1311, 1316 (CA 9, 1995).

Attorneys also engage (or certainly should engage) in self-vetting the evidentiary support for their own cases. Slucter does not suggest that any attorney in this case did anything wrong.[8] The expert's testimony is filtered through the attorney's professional expertise to determine its

[7] *Maiden, supra*, 461 Mich at 134, citing *Sanders, supra*.

[8] The proponent of the expert's testimony has the burden of proof under *Gilbert, supra*, 470 Mich at 781

legal significance, reliability, admissibility as evidence, and usefulness to the case at hand. The attorney typically chooses the expert and assists the expert in developing testimony that the attorney determines will be advantageous to the case. Legal malpractice insurance exists to handle disagreements that may (and often do) arise between attorneys and their clients who may become disgruntled about litigation strategy or otherwise, and lawyers are uniquely situated as professionals who *handle litigation*. Other professionals who may be asked to *provide testimony* are not similarly situated. Even assuming that "expert witness" insurance could be obtained for someone in Slucter's position (sued by the disgruntled client of the lawyer who hired him to be an expert witness in litigation), the economic and other burdens of such coverage would predictably preclude all but "professional witnesses" from being willing to take the work.

C. "The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation." [9]

Maiden also relied upon and quoted *Daoud v De Leau*, 455 Mich 181, 202-203; 565 NW2d 639 (1997), where this Court observed that:

> Witness immunity is also grounded in the need of the judicial system for testimony from witnesses who, taking their oaths, are free of concern that they themselves will be targeted by the loser for further litigation. Absent perjury of a character requiring action by the prosecuting attorney, the testimony of a witness is to be weighed by the factfinder in the matter at bar, not by a subsequent jury to determine whether the first lawsuit was tainted . . . [461 Mich at 135]

As discussed above, the Court of Appeals overlooked this principle, which is intended to aid the judicial system and protect its participants. Slucter's role as a witness in the judicial system also bears emphasis, since it is distinct from his other professional roles as a licensed real estate broker. The Court of Appeals recognized a similar distinction applicable to a treating psychologist versus a psychologist testifying in court proceedings in *Diehl v Danuloff*, 242 Mich App 120, 133,

[9] *Maiden*, supra, 461 Mich at 134, citing *Sanders, supra*.

n 3; 618 NW2d 83 (2000), explaining the need for absolute immunity for such testimony when provided in connection with the court's decision-making process:

> In contrast to a psychologist who is appointed by the court to render treatment to a party or individual, a remedial function arguably unrelated to the fact-finding and decision-making processes of the court, a psychologist appointed by the court to evaluate a family and make a recommendation in a custody dispute is performing a function intimately related and essential to the judicial process. Indeed, defendant's focus in performing evaluations, providing reports, and making recommendations was not necessarily on the best interests of the subject being evaluated or the parties involved in the litigation, but on aiding the court to separate truth from falsity. In this context, the need for absolute immunity is compelling. (citations omitted).

Here, the Court of Appeals attempted to distinguish an expert witness' testimony from his expert opinions. The Court stated for example:

> Additionally, the witness-immunity doctrine at issue in *Maiden* addresses only actual testimony. That immunity necessarily extends to any other materials or evidence prepared by the witness for the intended benefit of the court . . .[but] the *Estate alleges that the Mogill defendants not only provided incompetent opinions but failed to undertake reasonable care and skill in forming those opinions*. [326 Mich at 675; emphasis added.]

The Court of Appeals' attempted distinction between an expert witness' testimony and the opinion basis for that testimony is contrary to *Maiden, supra*, 461 Mich at 134 ("Witnesses who are an integral part of the judicial process 'are wholly immune from liability for the consequences of their testimony ***or related evaluations***'"; citations omitted; emphasis added). See also, *Otero v Warnick*, 241 Mich App 143, 153; 614 NW2d 177 (2000) (absolute immunity "even though defendant's examination was performed, and his ***opinion developed, out of court***"; emphasis added). There is no practical way to separate an expert witness' testimony from the opinion basis for that testimony. According to the Court of Appeals, witness immunity can simply be avoided by suing expert witnesses for the basis of their opinions, rather than for their testimony itself. The Court of Appeals' false distinction would eviscerate witness immunity and cannot be allowed to stand.

D. ***"Plaintiff cannot avoid the protection of witness immunity by artful pleading; the gravamen of plaintiff's action is determined by considering the entire claim."*** [10]

No matter how artfully Plaintiffs state their claims, Slucter is being sued in this case for being a witness. The Court of Appeals erroneously presumed a new cause of action for witness negligence, and then ignored binding authority holding that actions against witnesses are barred by witness immunity. Slucter urges this Court to correct and clarify the law by reaffirming the rules observed in *Maiden*. From Slucter's perspective as a real estate broker who is sued for being an expert witness, no such cause of action should even exist. To the extent that such a novel cause of action arguably exists, however, then witness immunity bars it.

[10] *Maiden*, *supra*, 461 Mich at 135.

RELIEF REQUESTED

Slucter respectfully requests that this Court grant leave to appeal or issue a peremptory order pursuant to MCR 7.305(H)(1), reversing the Court of Appeals' Opinion, and reinstating the Circuit Court's grant of summary disposition in favor of Defendants-Appellants (Joint App, pp. 55a, 58a).

Respectfully submitted,

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Dated: January 24, 2020

By: /s/ John S. Brennan
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